Supreme Court, U.S.
FILED
APR 29 1994
OFFICE OF THE CLERK

(5)

No. 93-6892

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MATTHEW WAYNE TOME,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE PETITIONER

TOVA INDRITZ
Federal Public Defender
CAROL H. MARION
JOSEPH W. GANDERT *
Assistant Federal Public Defenders
105 6th Street, S.W.
P.O. Box 449
Albuquerque, New Mexico 87103
(505) 766-3293
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

47 pp

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether a prior consistent statement made *after* a declarant's motive to fabricate arose rebuts a charge of recent fabrication or improper influence or motive under Fed. R. Evid. 801(d)(1)(B).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	2
A. Trial Proceedings	2
B. The Court of Appeals' Opinion	10
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. THE LANGUAGE AND COMMON LAW ANTECEDENTS OF RULE 801(d)(1)(B) REQUIRE THAT A PRIOR CONSISTENT STATEMENT PRECEDE IN TIME AN IMPROPER MOTIVE TO BE ADMISSIBLE	13
A. The Language Of Rule 801(d)(1)(B) Establishes That The Consistent Statement Must Be Made Prior To A More Recent Fabrication Or Improper Influence Or Motive To Be Admissible	14
B. The Common Law Antecedents Of Rule 801(d)(1)(B) Require That A Prior Consistent Statement Admitted To Rebut A Charge Of Improper Motive Predate That Motive	19
C. The Tenth Circuit's Balancing Test Is Inconsistent With The Language And Common Law Antecedents Of Rule 801(d)(1)(B), And With The Structure Of Rules 401-403, 801-804	26

TABLE OF CONTENTS—Continued

	Page
II. DISTRICT COURTS ARE REQUIRED TO MAKE FINDINGS DEMONSTRATING BY A PREPONDERANCE OF THE EVIDENCE THAT A PRIOR CONSISTENT STATEMENT SERVES TO REBUT A CHARGED MOTIVE TO FABRICATE	31
III. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT A STATEMENT SUBJECT TO A WEAK MOTIVE TO FABRICATE DOES NOT REBUT A CHARGE THAT TESTIMONY WAS AFFECTED BY THE IDENTICAL WEAK MOTIVE	32
CONCLUSION	35

TABLE OF AUTHORITIES

CASES	Page
Affronti v. *United States*, 145 F.2d 3 (8th Cir. 1944)	18
Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)	13, 22
Bourjaily v. *United States*, 483 U.S. 171 (1987)	13, 31
Conrad v. *Griffey*, 52 U.S. (11 How.) 480 (1850)	12, 23
Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993)	13
DiCarlo v. *United States*, 6 F.2d 364 (2d Cir. 1925)	24
Dowdy v. *United States*, 46 F.2d 417 (4th Cir. 1931)	24
Ellicott v. *Pearl*, 35 U.S. (10 Pet.) 412 (1836)	12, 20, 22, 23
Felice v. *Long Island R.R.*, 426 F.2d 192 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970)	24
Green v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989)	15, 20
Huddleston v. *United States*, 485 U.S. 681 (1988)	13
Lindsey v. *United States*, 237 F.2d 893 (9th Cir. 1956)	24
Malone v. *United States*, 94 F.2d 281 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938)	18, 24
People v. *Singer*, 89 N.E.2d 710 (N.Y. 1949)	18, 19, 21
Ryan v. *United Parcel Service, Inc.*, 205 F.2d 362 (2d Cir. 1953)	18
United States v. *Abel*, 469 U.S. 45 (1984)	12, 19
United States v. *Allen*, 579 F.2d 531 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978)	18
United States v. *Anderson*, 782 F.2d 908 (11th Cir. 1986)	16
United States v. *Andrews*, 765 F.2d 1491 (11th Cir.), *cert. denied*, 474 U.S. 1064 (1986)	18
United States v. *Brennan*, 798 F.2d 581 (2d Cir. 1986)	15
United States v. *Casoni*, 950 F.2d 893 (3rd Cir. 1991)	15
United States v. *Check*, 582 F.2d 668 (2d Cir. 1978)	20

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Corry*, 183 F.2d 155 (2d Cir. 1950)	24
United States v. *Feldman*, 711 F.2d 758 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983)	18
United States v. *Gandy*, 469 F.2d 1134 (5th Cir.), *cert. denied*, 410 U.S. 984 (1973)	24
United States v. *Henderson*, 717 F.2d 135 (4th Cir.), *cert. denied*, 465 U.S. 1009 (1984)	15
United States v. *Lawson*, 872 F.2d 179 (6th Cir. 1989)	16
United States v. *Leggett*, 312 F.2d 566 (4th Cir. 1962)	24
United States v. *Lewis*, 954 F.2d 1386 (7th Cir. 1992)	15
United States v. *Mazza*, 792 F.2d 1210 (1st Cir.), *cert. denied*, 479 U.S. 1086 (1987)	34
United States v. *Miller*, 874 F.2d 1255 (9th Cir. 1989)	16, 26
United States v. *Montague*, 958 F.2d 1094 (D.C. Cir. 1992)	15-16
United States v. *Owens*, 484 U.S. 554 (1988)	11, 13, 19
United States v. *Parry*, 649 F.2d 292 (5th Cir. Unit B 1981)	16
United States v. *Pierre*, 781 F.2d 329 (2d Cir. 1986)	18
United States v. *Potash*, 118 F.2d 54 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941)	24
United States v. *Quinto*, 582 F.2d 224 (2d Cir. 1978)	20, 23, 24, 25
United States v. *Rodriguez*, 452 F.2d 1146 (9th Cir. 1972)	24
United States v. *Salerno*, 112 S.Ct. 2503 (1992)	13, 27, 35
United States v. *Tome*, 3 F.3d 342 (10th Cir. 1992), *cert. granted*, 114 S.Ct. 1048, 127 L.Ed.2d 370 (1994)	1, 10
United States v. *Vest*, 842 F.2d 1319 (1st Cir. 1988)	15
United States v. *White*, 11 F.3d 1446 (8th Cir. 1993)	15, 16, 17

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Zito*, 467 F.2d 1401 (2d Cir. 1972)	20, 24
STATUTES	
18 U.S.C. § 1153	2
18 U.S.C. § 2241(c)	2
18 U.S.C. § 2245(2)(A) and (B)	2
28 U.S.C. 1254(1)	1
Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. App. (1988)	1
FEDERAL RULES OF EVIDENCE	
Rule 104(a)	31
Rule 401-403	26, 28, 30, 33
Rule 402	10
Rule 402-403	28
Rule 403	10
Rule 609	15
Rule 801	8
Rule 801-804	26, 28, 30
Rule 801(d)(1)	30
Rule 801(d)(1)(A)	30
Rule 801(d)(1)(B)	*passim*
Rule 801(d)(1)(C)	30
Rule 803(3)	6
Rule 803(4)	7, 8
Rule 803(24)	6, 12, 27, 28
Rule 804(b)(1)	13
NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES	
28 U.S.C. App., at 771	22, 29, 30
28 U.S.C. App., at 773	21
OTHER AUTHORITIES	
4 J. Bailey III & O. Trelles II, *The Federal Rules of Evidence: Legislative Histories and Related Documents* (1980)	1
Black's Law Dictionary (5th ed. 1979)	14, 26

TABLE OF AUTHORITIES—Continued

	Page
Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932 (1962)	30
E. Cleary, *McCormick on Evidence* (3d ed. 1984)	25
E. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908 (1978)	19
II Evans' *Pothier on Contracts* (1826)	21
Federal Rules of Evidence for the United States Courts and Magistrates (West Publishing Co. 1994)	1
M. Graham, *Federal Practice and Procedure: Evidence* (Interim Edition 1992)	15, 21
M. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 Hastings L.J. 575 (1979)	23-24
Ladd, *The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof*, 18 Minn.L.Rev. 506 (1934)	29
4 D. Louisell & C. Mueller, *Federal Evidence* (1980)	21
McCormick on Evidence (4th ed. J.W. Strong 1992)	15, 16, 18, 19, 23, 25, 27
11 J. Moore & H. Bendix, *Moore's Federal Practice* (2d ed. 1994)	22
E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and A New Proposal*, 1987 B.Y.U.L.R. 231	18, 20, 21
Webster's II New Riverside University Dictionary (1984)	26
4 J. Weinstein & M. Berger, *Weinstein's Evidence* (1993)	16, 23, 25
Weinstein, *The Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961)	28-29
4 Wigmore, *Evidence* (Chadbourn rev. 1972)	15, 23

OPINIONS BELOW

The opinion of the court of appeals (J.A. 21-41) is reported at 3 F.3d 342. The opinion of the district court (J.A. 9-10, 13-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1993. The petition for a writ of certiorari was filed on November 24, 1993, and was granted on February 22, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AT ISSUE

Congress enacted the Federal Rules of Evidence in 1975. Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. App. (1988). The complete text of Rules 104 (a), 401 to 403, 801(a)-(d)(1), 802, and 803(24) is set forth herein at App. 1-3. The Advisory Committee's Notes to the Rules are set forth in full in *Federal Rules of Evidence for the United States Courts and Magistrates* (West Publishing Co. 1994). For legislative history of the rules, *see* generally 4 J. Bailey III & O. Trelles II, *The Federal Rules of Evidence: Legislative Histories and Related Documents* (1980).

This appeal directly concerns Fed. R. Evid. 801(d)(1)(B) which states:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> > (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . .

STATEMENT OF THE CASE

A. Trial Proceedings

On August 22, 1991, the petitioner, Matthew Wayne Tome, a Navajo Indian, was charged in a one-count superseding incident with engaging in sexual acts with a female Indian child under the age of twelve years (his daughter), in violation of 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A) and (B). JA 2-3. The indictment charged that the acts occurred in Indian Country some two years earlier, on or about June and July, 1989. A jury trial was held in this case from February 24, 1992, through March 2, 1992.

The accusations giving rise to these charges arose during the course of a bitter, protracted child custody dispute between petitioner and his ex-wife, Beverly Padilla. The couple were divorced in September, 1988, by decree of the Navajo Tribal Court. The court awarded joint custody of their only child, a daughter, A.T., born June 18, 1985, to both parents with primary physical custody to petitioner. Tr. 625-26.

Between September, 1988, and May, 1989, petitioner had custody of A.T. on weekdays; Padilla had custody on the weekends. The parents alternated custody of A.T. every two weeks during the summer of 1989. A.T. was with her mother from June 16, 1989, through June 30, 1989. Tr. 396-97, 412, 626, 633.

In mid-1989, Padilla applied to the Navajo Tribal Court to modify the custody order concerning A.T. to give her primary custody. Following a hearing on August 24, 1989, the court denied Padilla's petition for a change of custody. Petitioner was ordered to maintain primary custody of A.T. during the 1989-90 school year; Padilla received custody on weekends and throughout the summer of 1990. Tr. 398, 401, 411, 431, 529-32, 633-35.

The summer of 1990 represented the longest continuous time period in which Padilla had maintained custody of A.T. since the time of the divorce. By this time,

Padilla had remarried and was residing with her new husband and their infant son in Colorado Springs, Colorado. A.T. spent the summer of 1990 in Colorado Springs with Padilla and her new family; the child was to be returned to petitioner at the end of the summer. Tr. 400-01, 434, 634.

As a result of Padilla's continued battle for custody of A.T., a court hearing was scheduled for August 22, 1990, to review custody arrangements. The tribal court ordered that petitioner retain primary custody of A.T. and that Padilla continue to receive visitation. Padilla did not attend that hearing; she testified at petitioner's trial that she mistakenly believed that the hearing was to be held two days later. Tr. 446, 449, 538.

In November, 1990, after A.T. had come forward with her allegations of sexual abuse against her father, the Navajo Tribe filed a dependency action concerning the child. Dependency actions are filed in cases involving allegations of neglect, abandonment, or abuse of a child. A hearing was held on January 24, 1991. By tribal court order of February 15, 1991, Padilla received physical custody of A.T. and petitioner was granted visitation rights. Tr. 539-43.

The government maintained that the offenses with which Tome was charged occurred on or about June 18, 1989, the date of A.T.'s fourth birthday. At trial, A.T., then almost seven years old, was the government's first witness. Although she was able to respond to preliminary inquiries, her testimony on direct examination about the alleged abuse was brief and consisted almost entirely of supplying the indicated answer to a series of leading questions by government counsel. Tr. 83-84.

The following exchange occurred on the government's direct examination of A.T.:

> Q Did daddy take your clothes off, yes or no?
> A Yes.

Q Okay. Did daddy take his clothes off?
A Yes.

Tr. 88.

* * * *

Q . . . Did he do something?
A Yes.
Q Was it good something or bad something?
A Bad.
Q It was bad. Did it hurt or did it feel good?
A Hurt.

Tr. 89.

* * * *

Q . . . Did he put his private place any place on you?
A Yes.

Tr. 90.

* * * *

Q Where did daddy place his private place, just point, point to me. Point to where you are looking right now. . .

Q What do you call this place? What is that place on you? Do you have a name for that?
A No.
Q You don't call it anything? Do you go potty there?
A Yes.
Q Okay. And Andrea, where did your daddy place his private thing, anywhere else? And point to me if he did, where. Point to my body wherever he put it. Where? Is that my mouth you are pointing at? Say yes or no.
A Yes
Q All right. Did he put his private thing in your mouth?
A Yes.

Tr. 92-93. Finally, the child was asked whether she went to the bathroom after the incident; she again responded "yes" and added that she wiped off blood. Tr. 93-94.

On cross-examination, A.T. responded to questions posed by defense counsel about extraneous matters, but failed to respond to nearly all queries concerning the allegations of sexual abuse. The trial judge, obviously troubled by the child's uncooperativeness on cross-examination, stated:

> [I]ntegrals of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds. I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 seconds, many times 20 seconds, 25 seconds. And I've been timing that with my watch.

Tr. 147. A.T. testified that the only person with whom she had discussed the alleged abuse was the prosecutor. Tr. 145. The child denied that she ever spoke with her babysitter about the alleged abuse; she either failed to respond or stated that she was unable to remember when asked about other out-of-court statements concerning the alleged abuse. Tr. 152-53.

The defense established on cross-examination that A.T. preferred to live with her mother rather than her father. The child was asked whether she played with friends; she responded that she did at her mother's but not at her father's. A.T. testified that she missed her mother when she was with her father, but that she did not miss her father when she lived with her mother. JA 4-5.

The trial court permitted the admission of seven of A.T.'s out-of-court statements under Fed. R. Evid. 801(d)(1)(B), concluding that defense counsel impliedly had charged A.T. with the improper motive of preferring to live with her mother. JA 9-11, 14. The trial court did not address the issue of how the prior consistent statements

served to rebut the charge of recent fabrication or improper influence or motive. Defense counsel objected that the court's ruling was overbroad. JA 10, 14.

The seven statements admitted under Rule 801(d)(1)(B) were as follows:[1]

1. A statement by the five-year-old A.T. to Lisa Rocha, friend of Padilla and babysitter of A.T., on August 22, 1990,[2] the day before A.T. was scheduled to return to her father's custody. Rocha testified that A.T. said, "Please don't let my mom take my [sic] back to my father." When Rocha asked her "why", A.T. said, "Because I don't want to go back." To Rocha's repeated "why" question, A.T. was said to have responded, "Because my father gets drunk and he thinks I'm his wife." JA 11-12.[3]

2. A statement by A.T. to Rocha on August 27, 1990.[4] Rocha questioned A.T. at Padilla's request about A.T.'s prior statement that her father thinks she's his wife. Rocha testified that A.T. told her that her father dragged her through the house by her arms, took her clothes off, forced her legs open, and laid on top of her. Rocha further testified that A.T. stated that she got a sharp pain near her stomach and that

[1] Six of the seven statements inculpated Tome in the sexual abuse of A.T.; the sole exception was the statement testified to by Dr. Spiegel.

[2] The date of A.T.'s first statement about the alleged abuse coincided with the date of the hearing in which the tribal court reviewed custody arrangements concerning A.T. See discussion at page 4, *supra*.

[3] The trial court also concluded that the child's August 22 statement to Rocha was admissible under Rule 803(24) because there were circumstantial guarantees of trustworthiness equivalent to those which render statements admissible under the Rule 803(3) hearsay exception, which deals with present mental condition.

[4] After Padilla learned that she had missed the court hearing held on August 22, 1990, she did not return A.T. to petitioner; instead she brought A.T. back to Colorado Springs. Tr. 404.

when she cried for her mother, her father told her, "[y]our mother's a bitch." Rocha stated that A.T. also related how she had wiped herself with a bloody tissue. JA 12.

3. Padilla testified that she was in another room of the apartment where A.T.'s conversation with Rocha occurred on August 27, 1990. She was permitted to testify that she overheard A.T. tell Rocha about A.T.'s father pulling her legs apart. JA 20.

4. A statement by A.T. to Kae Ecklebarger, a social worker with Child Protection Services at El Paso County Social Services, on August 29, 1990. Ecklebarger testified that prior to her interview with A.T., she was informed of the sexual abuse allegations by Padilla and Rocha. Ecklebarger stated that A.T. told her that her father "put his balls in her" and kissed her all over her body, including the vaginal area. Ecklebarger also testified that A.T. told her that her father asked her to touch his penis and that she refused. According to Ecklebarger, A.T. told her that she wiped herself and saved the bloody tissue. A.T. showed it to her grandmother who responded, "If he does it again, I'm going to haul him away." A.T.'s grandmother was said to have confronted petitioner in the child's presence; he allegedly turned to A.T. and said, "It's all your fault." A.T. was said to have replied, "No, it isn't, it's all your fault." JA 16-18.

5. A statement by A.T. to Dr. Karen Kuper, a pediatrician, to whom A.T. was referred by Ecklebarger. Dr. Kuper testified that she interviewed A.T. in Padilla's presence. A.T. was said to have told Dr. Kuper that her father touched her vginal area and put "his thing" inside her. Dr. Kuper also testified that the child told her that when that happened, it had hurt and scared her.[5] JA 15.

[5] The district court also ruled that the testimony of Dr. Kuper was admissible under Fed. R. Evid. 803(4).

6. A statement by A.T. to Dr. Laura Reich, a pediatrician, who examined A.T. on September 21, 1990, in order to treat her for a rash in the vaginal area which Dr. Reich determined to have been unrelated to sexual abuse. A.T.'s mother informed Dr. Reich, prior to her examination of A.T., that Dr. Kuper had recently seen the child for possible sexual abuse. Dr. Reich testified over objection, JA 16, that A.T. told her that her father had "put his thing in her."[6] *Id.*

7. A statement by A.T. to Dr. Jean Spiegel, a third pediatrician. Dr. Spiegel testified that A.T. told her that she was touched on her breasts, her front privates, and her bottom where her poop comes out.[7] JA 20.

Dr. Kuper testified that she conducted a vaginal examination of A.T. which revealed a thin rim of hymenal tissue. Tr. 259. On cross-examination, she stated that the amount of hymenal tissue shrinks as a girl matures and that the amount of tissue A.T. had was consistent with the normal amount for an eight to ten year old girl. Tr. 273. According to Dr. Reich, her examination of A.T. indicated that the child's vaginal opening was larger than normal for her age. Tr. 293. Dr. Spiegel testified that A.T. had a very thin rim of hymenal tissue with an opening that was large for her age. Tr. 472.

Matthew Tome took the stand in his own defense and denied sexually abusing A.T. He testified, as Padilla had, Tr. 428, that the two of them experienced continual conflict over custody and visitation arrangements concerning A.T. Petitioner stated that Padilla often complained about how he cared for A.T. Tr. 632, 642.

While petitioner had custody of A.T., she lived with him, his sister, Sheba, his brother, and his parents in Mitten Rock, New Mexico. Petitioner's sister and mother,

[6] The trial court did not specifically address the admissibility of Reich's testimony concerning the child's statements to her.

[7] The district court stated, without elaboration, that Spiegel's testimony was admissible under Rules 801 and 803(4). Tr. 466.

Sheba and Sadie Tome, both testified that they never saw any indication of sexual abuse while A.T. lived with them and that A.T. had a good relationship with them and with her father. Both women denied that A.T. ever showed them any bloody tissue. Tr. 598-605, 607, 614-17, 619-20, 622.

A number of character witnesses testified on petitioner's behalf. Ida Nakai, an assistant teacher, and Cecilia Atcitty, a teacher's aide, both from the head start preschool program which A.T. attended for two years while in petitioner's custody, testified on his behalf. Petitioner was actively involved in the school as the local parent policy president. They testified that A.T. was a happy, well-adjusted child during her attendance at their school. Tr. 547, 551, 554, 559-60, 565-66.

Marjorie Owen and Leonard Anthony, who also knew petitioner through his active involvement with the head start program, testified that petitioner was a truthful person in his dealings with them. Anthony testified that petitioner demonstrated commitment to advancing the educational goals of the community and that he was a strong leader. Janice Kavadas, petitioner's high school English teacher, and Ralph Wegner, petitioner's employer for five years, testified that he was a very honest and trustworthy person. Tr. 654-56, 659-61, 665, 671.

In closing argument, the prosecutor recounted at length the substance of A.T.'s out-of-court statements. Tr. 714-22, 724-25, 744. She did not argue that the child was not motivated to accuse her father by her desire to live with her mother. In fact, the prosecutor made no mention in either her closing or her rebuttal argument of the charged improper motive that spawned the admission of the seven prior statements.

On March 3, 1992, the jury returned a guilty verdict. On May 15, 1992, the District Court sentenced Tome to a term of 144 months' (12 years') imprisonment.

B. The Court of Appeals' Opinion

On appeal to the United States Court of Appeals for the Tenth Circuit, petitioner challenged the trial court's admission under Rule 801(d)(1)(B) of A.T.'s seven prior statements. Petitioner maintained that the statements did not serve to rebut a charge by the defense that the child's accusations were motivated by a desire to live with her mother because that motive existed at the time A.T. allegedly made the prior statements.

The Tenth Circuit upheld Tome's conviction, ruling that the seven statements were properly admitted as substantive evidence under Fed. R. Evid. 801(d)(1)(B). According to the appeals court's rationale, where a charged improper motive predates a prior statement, courts must determine whether the statement is probative under Federal Rules of Evidence 402 and 403. JA 35. The pertinent factors to be weighed are the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie. JA 34.

The court of appeals found that the charged improper motive in this case was A.T.'s desire to live with her mother. JA 36. Untroubled by the fact that the child had the same motive to remain with her mother at the time of her statements as at the time of trial, the court stated, "Although this argument [that A.T. fabricated her allegations about her father because she wished to live with her mother] does present some motive to lie, we do not believe that it is a particularly strong one." JA 36. In support of its ruling upholding admission of A.T.'s prior statements, the court cited the spontaneity of the child's initial allegation of abuse and petitioner's "failure" to present evidence that the child possessed the ability to fabricate the allegations of abuse. JA 36-37.

On February 22, 1994, this Court granted certiorari, limited to the single question presented above. 114 S.Ct. 1048, 127 L.Ed.2d 370 (1994).

SUMMARY OF ARGUMENT

Federal Rule of Evidence 801(d)(1)(B) provides that a statement consistent with the declarant's testimony is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination and the statement is "offered to rebut an express or implied charge of recent fabrication or improper influence or motive. . . ." The Tenth Circuit rejected the holdings of numerous other courts of appeals and ruled that statements made *after* the declarant's motive to fabricate arose were nevertheless admissible to rebut an allegation that her in-court statements were the product of that motive. The Tenth Circuit's decision is inconsistent with the language of Rule 801(d)(1)(B), with its common law antecedents, and with the structure of the Federal Rules of Evidence.

Rule 801(d)(1)(B) allows courts to admit only those prior statements that *rebut* a charge of recent fabrication or improper influence or motive. A prior consistent statement rebuts a charged improper motive by showing that the declarant told the same story independent of the motive. This tends to prove that the challenged testimony is not a "recent fabrication" because a similar statement was made before the motive to fabricate arose. A consistent statement made after the motive to fabricate arose, while perhaps "relevant" to the allegation of fabrication, does not meet the standard set by Rule 801(d)(1)(B), which requires that the statement "rebut" the charge that the in-court testimony is false.

Rule 801(d)(1)(B) further limits the admissibility of prior consistent statements to those that rebut a charge of "*recent* fabrication or improper influence or motive" (emphasis added). The "more natural reading" (*United States* v. *Owens*, 484 U.S. 554, 561 (1988)) of the term "recent" is that the fabrication be more recent than the prior consistent statement, which is the interpretation of Rule 801(d)(1)(B) that most courts and commentators have adopted.

The Tenth Circuit's balancing test conflicts not only with the language of Rule 801(d)(1)(B) but with the common law precedent that this Court has held to be appropriate guidance in interpreting the scope of the Federal Rules of Evidence. *United States* v. *Abel*, 469 U.S. 45, 52 (1984). The common law rule, as this Court held long ago, is that prior consistent statements are not admissible if they were made after the motive to fabricate arose. *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) 412, 439 (1836); *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480, 491-92 (1850). The language of Rule 801(d)(1)(B), which repeats the terms of art in the common law, as well as the Notes of the Advisory Committee on the Federal Rules of Evidence, confirm that Rule 801(d)(1)(B) was intended to and does carry forward and codify this traditional common law understanding concerning the admissibility of prior statements. *Cf., e.g.*, Rule 801(d)(1)(B) *with Ellicott v. Pearl*, 35 U.S. (10 Pet.) at 439 ("where the testimony is assailed as a *fabrication* of *recent* date . . . in order to *repel* such imputation, proof of the antecedent declaration of the party may be admitted") (emphasis added).

The Tenth Circuit's balancing test also conflicts with the structure of the Federal Rules of Evidence. The Rules are designed, with few exceptions, to eliminate from the judge's purview the uncertain task of weighing the probative force of hearsay statements in light of various "factors" and instead to create certain clear categories or classes of admissible statements. Where balancing is to be done, such as in Rule 803(24), the Rules clearly set forth the factors for the court to consider, factors that were ignored here. *See* Fed. R. Evid. 803(24). Converting Rule 801(d)(1)(B) into a balancing test thus does violence not only to that rule but to Rule 803(24) and to the fundamental principles that underlie the federal hearsay rules.

Before admitting a prior statement to rebut a charge of recent fabrication or improper influence or motive, the

trial court should be required to find by a preponderance of the evidence that the prior statement was made prior to the time the declarant's alleged improper motive arose. In this case, the court of appeals should have held that, because the child had the same motive to remain with her mother at the time of her prior statements as she did at the time of trial, her prior statements could not and did not rebut the charged motive and were therefore inadmissible.

ARGUMENT

I. THE LANGUAGE AND COMMON LAW ANTECEDENTS OF RULE 801(d)(1)(B) REQUIRE THAT A PRIOR CONSISTENT STATEMENT PRECEDE IN TIME AN IMPROPER MOTIVE TO BE ADMISSIBLE.

In interpreting the Federal Rules of Evidence, this Court consistently follows the well-settled canon of statutory construction that the plain meaning of the language of the Rules controls. The starting point for analysis of a Federal Rule of Evidence is "the language of the Rule itself." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 163 (1988). The Federal Rules of Evidence must be interpreted in the same manner as statutes. *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2393 (1993).

Accordingly, this Court has repeatedly refused invitations either to relax or augment the plain requirements of a Rule of Evidence. *See, e.g., United States* v. *Salerno*, 112 S.Ct. 2503, 2507 (1992) ("[n]othing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements. . . . This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases"); *Huddleston* v. *United States*, 485 U.S. 681, 687-88 (1988); *Bourjaily* v. *United States*, 483 U.S. 171, 178 (1987); *Owens*, 484 U.S. at 561.

The language of Rule 801(d)(1)(B), particularly when read in the context of both the common law antecedents of the Rule and the structure of the Federal Rules of Evidence, compels the conclusion that a prior consistent statement is admissible under this Rule only when made prior in time to the existence of the alleged motive to fabricate. The Tenth Circuit therefore erred in admitting the testimony of six witnesses concerning A.T.'s prior statements.

A. The Language Of Rule 801(d)(1)(B) Establishes That The Consistent Statement Must Be Made Prior To A More Recent Fabrication Or Improper Influence Or Motive To Be Admissible.

1. A prior consistent statement is not hearsay if, *inter alia*, the statement "is offered to *rebut*" a charge of recent fabrication or improper influence or motive. Fed. R. Evid. 801(d)(1)(B) (emphasis added). The requirement under Rule 801(d)(1)(B) that a prior consistent statement predate the charged recent fabrication or improper motive is inherent in the Rule's limited application to statements that "rebut" alleged fabrications. "Rebut" is not synonymous with "relate." A prior statement rebuts a claim of fabrication only if it refutes or negates it. *See, e.g., Black's Law Dictionary* 1139 (5th ed. 1979):

> Rebut. In pleading and evidence, to defeat, refute or take away the effect of something. When a plaintiff in an action produces evidence which raises a presumption of the defendant's liability, and the defendant adduces evidence which shows that the presumption is ill-founded, he is said to "rebut it." [8]

[8] The rebuttal requirement of Rule 801(d)(1)(B) is clearly not met by a mere claim that a prior statement is "offered to" rebut if it does not, in fact, rebut the charges specified by the Rule. Such a reading could condition a hearsay exemption on spurious representations by the offering party. Although this Court has consistently adhered to the plain meaning of the text of the Federal Rules of Evidence, it has refused to interpret the Rules in a manner that leads to an absurd result. *See Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989) (refusing to interpret Rule 609 to reach an illogical result that would favor civil defendants over plaintiffs with respect to evidence of former convictions).

Such a rebuttal can be made, in turn, only by a prior statement that antedates the motive for fabrication. As Wigmore explains: "A consistent statement, at a *time prior* to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence." 4 Wigmore, *Evidence* § 1128 at 268 (Chadbourn rev. 1972) (hereinafter Wigmore) (emphasis in original). Other commentators [9] and most courts [10] are in accord.

[9] The commentators generally agree that relevancy to rebut a charge of improper motive turns on whether the statement precedes the existence of the improper motive. *See, e.g.*, 1 *McCormick on Evidence* § 47, at 177 (4th ed. J.W. Strong 1992) ("if the attacker has charged bias, interest, corrupt influence, contrivance to falsify or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated"); M. Graham, *Federal Practice and Procedure: Evidence* § 6712 n.8 (Interim Edition 1992) ("To rebut a charge of improper influence or motive, the prior consistent statement must precede the formation of the alleged partiality").

[10] The following circuits have held that a statement qualifies as nonhearsay under Rule 801(d)(1)(B) only if made before the charged improper motive arose: *United States* v. *Vest*, 842 F.2d 1319, 1329-30 (1st Cir. 1988); *United States* v. *Brennan*, 798 F.2d 581, 587 (2d Cir. 1986); *United States* v. *Casoni*, 950 F.2d 893, 904 (3rd Cir. 1991) (statement not relevant under relevancy rules if motive to fabricate existed when statement made); *United States* v. *Henderson*, 717 F.2d 135, 138 (4th Cir.), *cert. denied*, 465 U.S. 1009 (1984); *United States* v. *Lewis*, 954 F.2d 1386, 1391 (7th Cir. 1992); *United States* v. *White*, 11 F.3d 1446, 1450 (8th Cir. 1993). The following circuits have held that a prior statement can be used to rebut a charge of improper motive even if the statement does not predate the alleged motive: *United States* v. *Montague*, 958 F.2d

Conversely, if the prior statement was subject to the same improper motive as the trial testimony, it cannot rebut the impeachment. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 801(d)(1)(B)[01] at 801-188 to 801-189 (1993) (hereinafter Weinstein) ("Substantive use under Rule 801(d)(1)(B) is limited to situations where high probative value is most likely. . . . Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force 'for the simple reason that repetition does not imply veracity' ") (citation omitted)).[11] "The fact that the witness said the same thing, at a time when the same alleged motive was operative, provides no counterweight to the charge that she is saying it now because of that motive." *United States* v. *Montague*, 958 F.2d 1094, 1100 (D.C. Cir. 1992) (Judge Wald, concurring in the result and dissenting in part as to the rationale).

In a case factually similar to the instant case, *United States* v. *White*, 11 F.3d 1446 (8th Cir. 1993), the court determined that a statement by an alleged child sexual abuse victim did not qualify as nonhearsay under Rule 801(d)(1)(B) because the charged improper motive, if it existed at all, existed at the time of the statement.

1094, 1098 (D.C. Cir. 1992); *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. Unit B 1981); and *United States* v. *Anderson*, 782 F.2d 908, 915-16 (11th Cir. 1986). *See also United States* v. *Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989) (holding that the pre-motive requirement under Rule 801(d)(1)(B) should not be applied as a "rigid *per se* rule"); *United States* v. *Lawson*, 872 F.2d 179, 183 (6th Cir. 1989) (declaring that the fact that the alleged improper motive antedates the statement does not preclude its admissibility where other indicia of reliability surround the statement).

[11] *See also* 1 *McCormick on Evidence* § 47, at 174 (4th ed. J.W. Strong 1992) (the admissibility of a prior consistent statement turns on whether the prior statement is "logically relevant to rebut the impeaching fact. . . . The wall, attacked at one point, may not be fortified at another and distinct point").

> We have held, adhering to the rule in the majority of the circuits, that 'prior consistent statements must be entirely independent of the alleged motive to fabricate before they can be admitted for substantive purposes.' . . . We cannot say that this is the case here. Had R.H. made up the entire story prior to the filing of the complaint with the Department of Social Services, the statements he made to Martinez would have been part of the fabrication and therefore, of no probative value to a determination of whether the story was in fact a fabrication.

Id. at 1450-51 (citation omitted).

In sum, the explicit criterion in Rule 801(d)(1)(B) that the prior consistent statement "rebut" the charge of improper motive requires that the consistent statement be made prior to the time that the motive came into being.

2. There is a second anchor in the text of Rule 801(d)(1)(B) for the traditional understanding that prior consistent statements must predate the motive to fabricate. Rule 801(d)(1)(B) states that a witness's prior consistent statement is admissible if it "is offered to rebut an express or implied charge against the declarant of *recent* fabrication or improper influence or motive" (emphasis added). The word "recent" introduces a temporal criterion into the Rule's operation. Any valid interpretation of the rule must account for this temporal element. Any such interpretation must answer the question: "Recent with respect to what?".[12]

---

[12] As a preliminary matter, it should be noted that the most natural reading of Rule 801(d)(1)(B) is to apply the adjective "recent" to all three of the nouns that follow it, so that the Rule applies to charges of recent fabrication, recent improper motive, or recent improper influence. No comma follows the word fabrication to indicate that the word recent was not intended to modify the three nouns following it. Moreover, applying the word recent to all three is consistent with the fact that most courts, both under the common law and subsequent to adoption of Rule 801(d)(1)(B), have treated the terms "fabrication," "improper motive" and "improper influence" as interchangeable and synonymous with the

The Rule does not specifically answer this question. But the overwhelming consensus of courts and commentators is that the alleged recent fabrication, improper motive or improper influence must be more "recent" than the prior consistent statement. *See* 1 *McCormick on Evidence* § 47, at 179 n.24 (4th ed. J.W. Strong 1992) (hereinafter McCormick), citing *People* v. *Singer*, 89 N.E.2d 710 (N.Y. 1949) (the fabrication must be "more recent than the consistent statement"); E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and A New Proposal*, 1987 B.Y.U.L.R. 231, 246 (hereinafter Ohlbaum) (the term "recent" "purposefully introduces the crucial element of time frame during which the alleged motive to lie emerged. If improper influence or motive is the basis for the intentionally fabricated testimony, 'recent' fabrication requires that the motive occur after the consistent statement was made"); *see also* cases cited in Part I.B., *infra*.

---

concept of intentional falsification arising from improper motive. For the common law, see E. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and A New Proposal*, 1987 B.Y.U.L.R. 231, 239 (observing that "an examination of common law decisions reveals that even where the court labeled the charge 'recent fabrication,' the prior consistent statement was still required to have been made at a time before the [underlying] motive to fabricate existed"); *Malone* v. *United States*, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938) ("[T]he general rule [is that] where the testimony of the witness is assailed as a fabrication of a recent date, proof that he gave a similar account of the transaction when no motive existed, is admissible"); *Affronti* v. *United States*, 145 F.2d 3, 7 (8th Cir. 1944) (similar); *Ryan* v. *United Parcel Service, Inc.*, 205 F.2d 362, 364 (2d Cir. 1953) (similar). For post-1975 cases, see *United States* v. *Pierre*, 781 F.2d 329, 330 (2d Cir. 1986) (prior consistent statement is nonhearsay under Rule 801(d)(1)(B) "where the consistent statement was made prior to events creating a motive to testify falsely at trial"); *United States* v. *Andrews*, 765 F.2d 1491, 1501 (11th Cir.), *cert. denied*, 474 U.S. 1064 (1986); *United States* v. *Feldman*, 711 F.2d 758, 766 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983); *United States* v. *Allen*, 579 F.2d 531, 532 (9th Cir.), *cert. denied*, 439 U.S. 933 (1978).

The other potential referent for the term "recent" is the time of trial. In this interpretation, prior consistent statements would be admissible under Rule 801(d)(1)(B) only in those instances where an improper motive is alleged to have arisen near to the time of trial. There is no principled basis, under such a reading, to draw a line between those fabrications close enough to trial to trigger application of the Rule, and those too remote in time. Accordingly, the "more natural reading" (*United States* v. *Owens*, 484 U.S. at 561) of the term "recent" in Rule 801(d)(1)(B) is that the fabrication or improper motive must be more recent than the prior consistent statement. *See, e.g.*, McCormick, *supra*, § 47, at 179 n.24, discussing *Singer*, and citing additional authorities.

B. The Common Law Antecedents Of Rule 801(d)(1)(B) Require That A Prior Consistent Statement Admitted To Rebut A Charge Of Improper Motive Predate That Motive.

1. The common law antecedents of Rule (801)(d)(1)(B) confirm the correctness of the majority view of the Rule's meaning. As this Court has held, it is appropriate to look to the common law antecedents of the Rules of Federal Evidence in interpreting the Rules. *United States* v. *Abel*, 469 U.S. at 52 (quoting with approval the statement of E. Clearly (the Reporter for the Advisory Committee which drafted the Federal Rules of Evidence), *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908, 915 (1978), that "the body of common law knowledge continues to exist [for purposes of interpreting the Rules], though in the somewhat altered form of a source of guidance in the exercise of delegated power."); *id.* at 51 (looking to pre-1975 case law for guidance in interpreting the Federal Rules of Evidence). The rules are presumed to carry forward the common law understanding. "A party contending that legislative action changed settled law has

the burden of showing that the legislature intended such a change." *Green* v. *Bock Laundry*, 490 U.S. 504, 521 (1989).

The common law is particularly relevant here because Rule 801(d)(1)(B) codifies the traditional common law components required for the admission of prior consistent statements and uses the precise terms employed in countless numbers of pre-1975 cases. Moreover, the notes of the Advisory Committee expressly state its intent to codify the traditional rule for admitting such statements.

Rule 801(d)(1)(B) "codifies the traditional components required by common law for the admission of this 'carefully confined' class of statements." Ohlbaum at 242 (quoting *United States* v. *Check*, 582 F.2d 668, 680 (2d Cir. 1978)). Those components are that the declarant testifies at trial and is subject to cross examination concerning the statement, the statement is consistent with declarant's testimony, a predicate showing of an express or implied charge of recent fabrication or improper motive or influence exists, and the statement rebuts the charge. *See United States* v. *Quinto*, 582 F.2d 224, 233-34 (2d Cir. 1978) (listing components and holding that "the standards for determining whether prior consistent statements can now be admitted as substantive evidence [under the Rule] are precisely the same as the traditional standards"); Ohlbaum at 243.

In addition to codifying the traditional common law components, Rule 801(d)(1)(B) uses the exact terms most frequently employed in the common law. *See, e.g., Ellicott v. Pearl*, 35 U.S. (10 Pet.) at 439 ("where the testimony is assailed as a *fabrication* of *recent* date . . . in order to *repel* such imputation, proof of the antecedent declaration of the party may be admitted") (emphasis added); *United States* v. *Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972) ("prior consistent statements can only be introduced after a *charge* [of] . . . *recent fabrication* and where the statements were made before any *motive to fabricate* developed") (emphasis added);

Singer, 89 N.E.2d at 712 ("[a]ll this accords with the view anciently expressed . . . that the idea of *fabrication* may be *rebutted* 'by circumstances showing that the *motive* upon which it is supposed to have been founded, could not have had existence at the time when the previous relation was made, and which therefore *repel* the supposition of the fact related being an afterthought or *fabrication*'") (quoting II Evans' *Pothier on Contracts* at 251-52 (1826)) (emphasis added); Ohlbaum at 245 (the Rule "employs the precise language—'rebut[ting] . . . charge[s] . . . of recent fabrication or improper influence or motive'—consistently used in the panoply of pre-1975 decisions").

The Notes of the Advisory Committee on Rule 801(d)(1)(B) also indicate that the Rule was intended to codify the traditional common law requirements for the admission of prior consistent statements for rehabilitative purposes. The complete Advisory Committee notes expressly pertaining to Rule 801(d)(1)(B) provide:

> Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Advisory Committee Note, 28 U.S.C. App., at 773. As the notes indicate, the Committee did not alter the traditional standards for admission of prior consistent statements to rebut charges of recent fabrication or improper influence or motive; the rule merely made one change: permitting substantive admission of statements previously admitted solely for a rehabilitative purpose. *See* 4 D. Louisell & C. Mueller, *Federal Evidence* § 420, at 194-95 (1980); M. Graham, *Federal Practice and Procedure: Evidence* § 6712 n.4 (Interim Edition 1992). Indeed, the

Advisory Committee made plain its overall intention with the hearsay rules to preserve the common law: "The approach to hearsay in these rules is that of the common law, i.e., a general rule excluding hearsay, with exceptions under which evidence is not required to be excluded even though hearsay. The traditional hearsay exceptions are drawn upon for the exceptions. . . ." 28 U.S.C. App., at 771. Given the absence of Congressional comment or revision concerning Rule 801(d)(1)(B),[13] "the [Advisory] Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. at 165 n.9.

2. This Court recognized long ago that, under the common law, prior consistent statements are not admissible to rebut a charge of fabrication except where made prior to the charged motive to fabricate. The Court held in *Ellicott* v. *Pearl*, 35 U.S. (10 Pet.) at 439, that certain prior consistent statements made "subsequently" to prior inconsistent statements introduced to impeach the witness were rightly excluded, and stated:

> testimony under oath is better evidence than [the witness's] confirmatory declarations, not under oath; and the repetition of his assertion does not carry his credibility further, if so far, as his oath. . . . [T]here are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case; as, where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there,

[13] Congress did not question the Advisory Committee's indication that Rule 801(d)(1)(B) would permit substantive admission of statements traditionally admitted for rehabilitative purposes. The enactment of Fed. R. Evid. 801(d)(1)(B) generated virtually no controversy. Unlike the contested provisions of Rule 801(d)(1) subsections A and C, the terms of Rule 801(d)(1)(B) were uniform in substance in the March 1969 draft of the Rules, the 1971 draft, the form prescribed to Congress by this Court, and the Rule in its present form. *See* 11 J. Moore & H. Bendix, *Moore's Federal Practice* § 801.01, pp. VIII-15 to VIII-17 (2d ed. 1994).

> in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.

Fourteen years later, in *Conrad* v. *Griffey*, 52 U.S. (11 How.) 480, the Court held inadmissible a prior statement that did not precede an inconsistent statement with which a witness had been impeached. The Court stated, "So far as regards principle, one proper test of the admissibility of such statements is, that they must be made at least under circumstances when no moral influence existed to color or misrepresent them." *Id.* at 491 (citations omitted). The Court went on in *Conrad* to explain that prior statements "are admissible only to sustain the credit of the witness impugned, and not as per se proof of the facts stated." *Id.* at 492. *See also* Wigmore, *supra*, § 1123-1124, at 254-58.

Consistent with *Ellicott* and *Conrad*, the common law approach was that a prior statement was hearsay and could be admitted only in response to impeachment and only for rehabilitative purposes. *See* McCormick, *supra*, § 47, at 177 ("the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made *before* the sourse of the bias, interest, influence or incapacity originated. The above results should ordinarily be reached under the Federal Rules of Evidence") (emphasis in original; footnotes omitted); Wigmore, *supra*, § 1128, at 268);[14] Weinstein at 801-185 to 801-187; Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 Hastings

[14] The Government appears to concede that this was the established common law rule at the time of enactment of Rule 801(d)(1)(B). *See* Brief for the United States in Opposition [to Certiorari] at 13 (stating: "As the Second Circuit explained in *United States* v. *Quinto*, under the law of evidence before the adoption of the Federal Rules of Evidence, a prior statement must have been made before the motive to fabricate arose, because 'only then was the prior consistent statement "relevant" on the issue of credibility.' 582 F.2d at 233").

L.J. 575, 581 (1979); *United States* v. *Quinto*, 582 F.2d at 232-33 (holding that the traditional common law pre-motive requirement was "not altered" by Federal Rules of Evidence).[15] Courts traditionally were wary of the admission of prior statements, recognizing their inherent untrustworthiness and the danger that a designing witness might manufacture statements in order to create evidence. *See, e.g., United States* v. *Leggett*, 312 F.2d 566, 572 (4th Cir. 1962) ("[A] person might concoct an entirely false account of some happening and, after relating this account to a dozen of his neighbors, might call them in corroboration when at a later time he told the same untruthful story on the witness stand"); *Dowdy* v. *United States*, 46 F.2d 417, 424 (4th Cir. 1931).

In light of the common law view that prior consistent statements were highly suspect, were generally inferior to statements given under oath, and should be admitted only

---

[15] *See also DiCarlo* v. *United States*, 6 F.2d 364, 366 (2d Cir. 1925); *United States* v. *Potash*, 118 F.2d 54, 57 (2d Cir.), *cert. denied*, 313 U.S. 584 (1941); *United States* v. *Corry*, 183 F.2d 155, 157 (2d Cir. 1950); *Felice* v. *Long Island R.R.*, 426 F.2d 192, 198 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970); *Zito*, 467 F.2d at 1404 ("prior consistent statements can only be introduced after a charge [of] . . . recent fabrication and where the statements were made before any motive to fabricate developed"); *Dowdy* v. *United States*, 46 F.2d 417, 424 (4th Cir. 1931); *Malone* v. *United States*, 94 F.2d 281, 287 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938) ("the general rule [is that] where the testimony of the witness is assailed as a fabrication of a recent date, proof that he gave a similar account of the transaction when no motive existed, is admissible"); *Lindsey* v. *United States*, 237 F.2d 893, 895 (9th Cir. 1956) (recognizing pre-motive rule as "the majority view" and holding: "There is scant basis in reason or experience to admit [prior consistent statements], except in cases where it affirmatively appears that the prior consistent statement was made at a time when the declarant had no motive to fabricate"); *United States* v. *Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972). *But see United States* v. *Gandy*, 469 F.2d 1134, 1134-35 (5th Cir.), *cert. denied*, 410 U.S. 984 (1973) (per curiam) (prior consistent statement admissible although declarant had motive to fabricate at time of statement).

for purposes of rehabilitation, courts developed precise answers to the problem of when such statements should be admitted to rehabilitate. "The general test for solution is whether evidence of . . . consistent statements is *logically relevant* to explain the impeaching fact. The rehabilitating facts must meet a particular method of impeachment with *relative directness*." McCormick, *supra*, § 47, at 174 (emphasis added).

In sum, the intent of the Advisory Committee in recommending and Congress in enacting Rule 801(d)(1)(B) was that the Rule codify the traditional common law rule for the admission of prior consistent statements offered to rebut a charge of improper motive. The traditional rule was that such statements must have been made prior to the time the charged motive arose.[16] Given that the one change that the Advisory Committee did adopt was that statements admited under Rule 801(d)(1)(B) would be admitted for substantive, rather than as under the common law, merely rehabilitative, purposes,[17] "[i]t is of greatest importance" that such statements only be admitted, as intended by the drafters, under standards "precisely the same as the traditional standards. . . ." *United States* v. *Quinto*, 582 F.2d at 233.

---

[16] Professor Clearly summarized the intended application of Rule 801(d)(1)(B). "While prior consistent statements are hearsay by the traditional view and inadmissible as substantive evidence, they have nevertheless been allowed a limited admissibility for the purpose of supporting the credibility of a witness, particularly to show that a witness whose testimony has allegedly been influenced told the same story before the influence was brought to bear." E. Cleary, *McCormick on Evidence* § 251, at 747 (3d ed. 1984).

[17] The justification for permitting substantive use of prior statements in Rule 801(d)(1)(B) was twofold: first, the opponent opened the door to admission of prior statements by attacking the witness's credibility; second, as a practical matter, juries are unlikely to understand and apply a limiting instruction anyway, so there is no good reason to give one. Weinstein, *supra*, at 801-188; 2 *McCormick on Evidence* § 251, at 747 (4th ed. J.W. Strong 1992).

C. The Tenth Circuit's Balancing Test Is Inconsistent With The Language And Common Law Antecedents Of Rule 801(d)(1)(B), And With The Structure Of Rules 401-403, 801-804.

Instead of employing the traditional bright-line rule for determining the admissibility of a prior consistent statement—*i.e.*, whether the statement rebuts the charge of improper motive by having been made prior to the existence of the motive—the Tenth Circuit has proposed a balancing test. The judge must weigh "the strength of the motive to lie, the circumstances in which the statement was made, and the declarant's demonstrated propensity to lie." J.A. 34. In this manner, the Judge reaches a conclusion as to whether the statement has "significant" "probative force bearing on credibility apart from mere repetition." J.A. 34, quoting *United States* v. *Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989).

1. The Tenth Circuit's balancing test is inconsistent with the specific language and the common law antecedents of Rule 801(d)(1)(B). As discussed in Part I.A., *supra*, Rule 801(d)(1)(B) specifically applies only to prior consistent statements offered to "rebut" a charge of recent fabrication or improper motive. The commonly understood meaning of "rebut" is "to defeat" or "refute." *Black's Law Dictionary* 1139 (5th ed. 1979); *see Webster's II New Riverside University Dictionary* at 981 (1984). The Tenth Circuit's balancing test is inconsistent with Rule 801(d)(1)(B)'s limitation that admissible statements rebut the charge of improper motive. Rather than refuting, defeating, or repelling the charge of improper motive, statements admissible under the Tenth Circuit's test have merely been found to have some quantum of relevance or probative force bearing on issues concerning a witness's credibility. The Tenth Circuit's balancing test is much more lax than the standard inherent in the language of the Rule, and also does not account for the temporal criterion inhering in the Rule's use of

the terms "recent fabrication or improper influence or motive."

When viewed against the background of the common law antecedents of Rule 801(d)(1)(B), the error of applying the Tenth Circuit's balancing test is even more apparent. As shown in Part I.B., *supra*, the traditional common law solution to determining what prior consistent statements may be admitted to rehabilitate a witness is to require that a statement be "logically relevant to explain the impeaching fact." McCormick, *supra*, § 47, at 174. "The rehabilitating facts must meet a particular method of impeachment with directness." *Id.* With respect to charges of improper motive, the prior consistent statements must rebut the charge by having been made prior to the existence of the motive. The Tenth Circuit's balancing test is contrary to the natural reading of the language of Rule 801(d)(1)(B), to the traditional common law rule, and to the drafter's intent that Rule 801(d)(1)(B) embody the traditional common law rule. The Tenth Circuit is not permitted to make policy by rejecting the established, bright-line common law rule that the drafters incorporated in Rule 801(d)(1)(B). *United States* v. *Salerno*, 112 S.Ct. at 2507.

2. The Tenth Circuit's balancing test also is inconsistent with the structure of the Federal Rules of Evidence. First, the Tenth Circuit has selectively incorporated into its balancing test certain factors that the framers of the Federal Rules reserved for consideration under a different rule. The Rules provide for the weighing of indicia of trustworthiness surrounding the hearsay statement of a declarant "available as a witness" in Fed. R. Evid. 803(24). That rule provides in relevant part that "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . ." will not be excluded by the hearsay rule. Under Rule 803(24), a judge is required to weigh circumstantial factors, such as a declarant's ability to fabricate statements and the sponta-

neity of a declarant's statement, just as in the Tenth Circuit's test. Rule 803(24), however, requires that these "circumstantial guarantees of trustworthiness" be the "equivalent" of the guarantees of trustworthiness provided by other hearsay exceptions and also that the court determine that

> (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence.

The Tenth Circuit's test, which would admit out-of-court statements simply upon a finding that they had some quantum of probative force bearing on credibility, rather than upon a finding that "equivalent guarantees of trustworthiness" were present and that the other requirements of Rule 803(24) were met, is inconsistent with, and undercuts, Rule 803(24).

3. The Tenth Circuit's balancing test is also contrary to the structure of Fed. R. Evid. 401-403 and 801-804, and the Advisory Committee's intent that hearsay admissibility determinations under Rules 801-804 generally not turn on balancing tests such as those in Rules 402-403 involving the weighing of "probative force."

In drafting Article VIII, the Advisory Committee specifically considered and rejected the use of a balancing test based on "probative force" to determine the admissibility of hearsay, and specifically endorsed maintaining a system of well-defined class or category exceptions to the general ban on hearsay:

> Abandonment of the system of class exceptions in favor of individual treatment in the setting of the particular case, accompanied by procedural safeguards, has been impressively advocated. Weinstein, The Probative Force of Hearsay, 46 Iowa L. Rev. 331 (1961). Admissibility would be determined by weighing the probative force of the evidence against the possibility of prejudice, waste of time, and the availability of more satisfactory evidence. The bases of the traditional hearsay exceptions would be helpful in assessing probative force. Ladd, The Relationship of the Principles of Exclusionary Rules of Evidence to the Problem of Proof, 18 Minn.L.Rev. 506 (1934). Procedural safeguards would consist of notice of intention to use hearsay, free comment by the judge on the weight of the evidence, and a greater measure of authority in both trial and appellate judges to deal with evidence on the basis of weight. *The Advisory Committee has rejected this approach to hearsay* as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases.

Advisory Committee Notes to Article VIII, Introductory Note: The Hearsay Problem, 28 U.S.C. App., at 771 (emphasis added). The Advisory Committee thus considered, and rejected, as a general approach to admitting hearsay, the very balancing test proposed by the Tenth Circuit, *i.e.*, a balancing test "weighing the probative force of the evidence against the possibility of prejudice." *Id.* The Advisory Committee rejected this approach to hearsay as "involving too great a measure of judicial discretion," "minimizing the predictability of rulings," "enhancing the difficulties of preparation for trial," further complicating the "over-complicated congeries of pretrial procedures," and requiring different rules for civil and criminal cases.

In addition, the Advisory Committee expressed doubt that a judge could employ "probative force" in a balancing test without becoming the fact-finder and impermis-

sibly excluding evidence simply because he or she did not believe it:

> The only way in which the probative force of hearsay differs from the probative force of other testimony is in the absence of oath, demeanor, and cross examination as aids in determining credibility. For a judge to exclude evidence because he does not believe it has been described as "altogether atypical, extraordinary. . . ." Chadbourn, Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence, 75 Harv. L. Rev. 932, 947 (1962).

Id.

The Tenth Circuit's interpretation of Rule 801(d)(1)(B) thus runs counter to the structure of Rules 401-403 and 801-804. By retaining a "system of class exceptions" that define categories of admissible hearsay by using criteria that do not require weighing "probative force", the Advisory Committee sought to avoid employing analysis of probative force in determining admission. Each of the other exceptions in Rule 801(d)(1), for example, applies to narrowly defined categories of prior statements.[18] The language and common law antecedents of Rule 801(d)(1)(B) suggest that it, too, should be limited to a well-defined "class" not based on assessments of probative force, *i.e.*, to statements that logically rebut or disprove a charge of improper motive by arising prior to that motive.

---

[18] *See* Rule 801(d)(1)(A) (prior statement inconsistent with declarant's testimony); Rule 801(d)(1)(C) ("statement . . . of identification of the person made after perceiving the person").

II. DISTRICT COURTS ARE REQUIRED TO MAKE FINDINGS DEMONSTRATING BY A PREPONDERANCE OF THE EVIDENCE THAT A PRIOR CONSISTENT STATEMENT SERVES TO REBUT A CHARGED MOTIVE TO FABRICATE.

Fed. R. Evid. 104(a) provides, "Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b)." This Court held in *Bourjaily* that the offering party must establish, by a preponderance of the evidence, the preliminary facts relevant to the admissibility of a statement under the co-conspirator exception to the hearsay rule. 483 U.S. at 175-76. The same standard should apply when there is a dispute regarding preliminary facts relevant to the admissibility of a prior consistent statement under Rule 801(d)(1)(B).

When a party seeks the admission, over objection, of a prior statement to rebut a charge of improper motive, that party should be required to show when the alleged improper motive arose. Because a prior statement rebuts only if it antedates the existence of the charged improper motive, as argued in Part I, *supra*, a prior statement would not qualify as nonhearsay in the absence of a showing by a preponderance of the evidence that the statement preceded the motive.

Application of Rule 801(d)(1)(B) requires that district courts resolve disputed preliminary facts such as the timing of the improper motive. Prior to the admission of a prior statement to rebut a charge of improper motive, a district judge should make findings on the record explaining the basis of the conclusion that a prior statement does in fact rebut a charge of improper motive and thereby qualifies as nonhearsay under Rule 801(d)(1)(B).

III. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT A STATEMENT SUBJECT TO A WEAK MOTIVE TO FABRICATE DOES NOT REBUT A CHARGE THAT TESTIMONY WAS AFFECTED BY THE IDENTICAL WEAK MOTIVE.

The court of appeals erred in considering the strength of the charged improper motive in this case without recognizing that weak or strong, A.T. had the same motive to live with her mother at the time of her statements as at the time of trial.[19] The statements therefore had no relevance to rebut the charge of improper motive. The strength of the improper motive at trial is unrelated to the usefulness of a prior statement to rebut the existence of that motive.

The court of appeals was persuaded in this case that the statements were properly admitted because the charged improper motive is "not a particularly strong one". JA 37. On the other hand, the court stated, "prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar." JA 34. Nothing in Rule 801(d)(1)(B) lends support to the conclusion that prior statements should be admitted to rebut a weak improper motive but not a strong improper motive.

In this case, the appeals court upheld the substantive admission of seven statements by six witnesses to rebut a motive that the court found implausible.[20] The court's

[19] The government does not maintain and neither the court of appeals nor the district court has found that A.T.'s motive to remain with her mother was different at the time of her prior statements than at the time of trial.

[20] As the court of appeals recognized, it is clear on the record that A.T.'s seven prior statements were used substantively. JA 33, n.6. In closing argument, the government recounted at length the substance of A.T.'s out-of-court statements. Tr. 714-22, 724-25, 744. *See* page 11, *supra*. The court of appeals correctly noted, JA 33, n.6, that this case does not present the issue, on which the circuits are also divided, concerning the proper treatment under Rule 801(d)(1)(B) of statements used solely for rehabilitative purposes.

analysis turns logic on its head: prior statements are admitted in cases in which the charge of improper motive is not credible and hence rebuttal is not needed. Conversely, the court's rationale would render prior statements inadmissible in cases in which the charge of improper motive is highly credible. There is simply no justification for admitting prior statements to rebut a claim that is not credible.

The court of appeals' decision in this case effectively converts rule 801(d)(1)(B) into an open-ended hearsay exemption. According to the court's analysis, a prior consistent statement is exempt from the hearsay rule whenever there is a suggestion on cross-examination that a witness is not telling the truth; the statement is then admissible if relevant under the relevancy rules. Such a construction ignores the clear rebuttal mandate of Rule 801(d)(1)(B) and flies in the face of both the plain language and the legislative history of the Rule, discussed in Part I, *supra*. Indeed, it is so broad an opening as to be a complete contradiction of the language and spirit of the rule.

Creation of an open-ended hearsay exemption through Rule 801(d)(1)(B) paves the way for flagrant abuse of prior consistent statements. The court of appeals' interpretation of Rule 801(d)(1)(B) encourages parties in both civil and criminal cases to manufacture statements in order to buttress the declarant's story at trial. If the Rule 801(d)(1)(B) rebuttal requirement is treated merely as a relevance test under Rules 401-403, the government will be permitted to put on a parade of witnesses to recite out-of-court accusations and the defense will be permitted to put on a parade of witnesses to recite claims of innocence following any implication on cross-examination that a declarant is not telling the truth. The search for truth will be swiftly waylaid by stampedes of witnesses

repeating allegations of which they lack firsthand knowledge.

An open-ended approach to the admission of prior consistent statements creates incentives for litigants to hand-pick credible witnesses—such as the three doctors and the social worker used here—to hear a declarant's out-of-court statement so that they may convincingly relate the declarant's story to the jury at trial. After six witnesses recount their versions of declarant's out-of-court statements, the jury can easily overlook the fact that the declarant's own testimony was very weak. *See United States* v. *Mazza*, 792 F.2d 1210, 1215 (1st Cir.), *cert. denied*, 479 U.S. 1086 (1987) ("the government effectively managed to have the jury hear a second-hand account of [the accusatory witness'] entire story through witnesses whose credibility the jury was less apt to question"). The Tenth Circuit's analysis would permit a defendant, after a full confession to authorities, to bring in a host of elder statesmen and spiritual leaders at trial to repeat claims of innocence related to them subsequent to the confession. This risk is particularly severe under the Federal Rules, where the prior consistent statements are admissible not merely to rehabilitate but as substantive evidence.

The prosecution's case against petitioner rested almost entirely on out-of-court statements. The testimony of A.T., the only witness with firsthand knowledge of the truth of the accusations against petitioner, was exceedingly weak. Her testimony with respect to the allegations of abuse consisted of little more than assent to leading questions. After a vague hint on cross-examination that the child had an improper motive to accuse her father, the prosecution was allowed to bring in six witnesses who greatly expanded upon the child's testimony. These witnesses endowed A.T.'s story with reliability derived from their credibility. Four of the witnesses were highly credentialed professionals; five of them directly implicated petitioner in the acts of abuse. *None* of the six witnesses knew whether the allegations they recounted were true. The result, from the jury's perspective, is a parade of competent professionals seemingly vouching for the declarant's credibility.

In sum, the plain meaning and the legislative history of Fed. R. Evid. 801(d)(1)(B) demonstrate that a prior statement is defined as nonhearsay only if it rebuts a charge of recent fabrication or improper influence or motive. As this Court stated in *Salerno*, "Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted. . . ." 112 S.Ct. at 2507. In this case, because the declarant had the same motive at the time of her statements as at the time of trial, her statements did not serve to rebut the charge of improper motive or "recent" fabrication and thus did not fall within the Rule 801(d)(1)(B) definition of nonhearsay. The verdict in this case was obtained through reliance on inadmissible hearsay.

CONCLUSION

The judgment of the court of appeals must be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted,

TOVA INDRITZ
Federal Public Defender
CAROL H. MARION
JOSEPH W. GANDERT *
Assistant Federal Public Defenders
105 6th Street, S.W.
P.O. Box 449
Albuquerque, New Mexico 87103
(505) 766-3293
* Counsel of Record

APPENDIX

BEST AVAILABLE COPY

APPENDIX TO BRIEF OF PETITIONER

STATUTORY AND CONSTITUTIONAL PROVISIONS FEDERAL RULES OF EVIDENCE

Rule 104 provides, in relevant part:

Rule 104(a). Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 801 provides, in relevant part:

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person;

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803(24) provides, in relevant part:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.